(25,969)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 510.

THE CITY OF RICHMOND, PETITIONER,

vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, AND CHARLES E. WHITLOCK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 20, 1917.

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a UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit, Begun and Held at the Court House, in the City of Richmond, on the First Tuesday in February, Being the Sixth Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: Hon. J. C. Pritchard, Circuit Judge; Hon. Martin A. Knapp, Circuit Judge; Hon. Charles A. Woods, Circuit Judge.

Among other were the following proceedings, to-wit:

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

versus

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

1 *Petition to Superintend and Revise, etc.*

Filed June 23, 1916.

United States Circuit Court of Appeals, Fourth Circuit.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

To the Honorable the Judges of the Circuit Court of Appeals of the Fourth Circuit of the United States:

(1) The petition of Elizabeth W. Bird, of the Kingdom of England, Loulie W. Nolting, of the County of Albemarle, Virginia, and Charles E. Whitlock, of the City of Richmond, Virginia, respectfully shows unto your honors that they are the owners in fee simple of the certain lot of land in the City of Richmond, with the improvements thereon, known as Nos. 8, 10, 12 South 8th

Street, which said property was, on November 1st, 1909, and for several years prior thereto, in the occupancy as tenant of the Ainslie Carriage Company, the bankrupt herein, which was a corporation chartered under the laws of the State of Virginia, at an annual rental of two thousand dollars.

(2) That on the said first day of November, 1909, the said Ainslie Carriage Company, being in arrears of rent, your petitioners caused a distress warrant for rent to be levied upon the goods and chattels of said company then upon the leased premises
2 for the sum of twenty-nine hundred and twenty-nine and 57/100 dollars, that being the amount of said rent then due and payable to your petitioners.

(3) That before sale could be made under said distress warrant, the Chancery Court of the City of Richmond, through its receiver, took charge of all the assets of said Ainslie Carriage Company and proceeded to administer the same until the adjudication in bankruptcy next below mentioned.

(4) That the said Ainslie Carriage Company was duly adjudicated a bankrupt by the District Court of the United States for the Eastern District of Virginia on the 3rd day of February, 1910.

(5) That your petitioners asserted their lien for rent and proved their claim before the referee on the 20th day of May, 1910.

(6) That about the same time the City of Richmond proved its claim for delinquent taxes on personalty for the years 1907, 1908 and 1909, and its claim for current taxes for the year 1910, amounting in the aggregate to about six hundred dollars, for none of which taxes, however, did the said city exercise its right to distrain which was conferred upon it by section 72 of its charter.

(7) That during the progress of the cause there was an agreement of counsel that a sum sufficient to pay the city's claim in full should be retained in bank to await the determination of the question of priority between petitioners and said city and that the balance of the fund should be distributed. That accordingly an order was entered on the 14th day of July, 1910, paying the costs of administration and paying to petitioners one year's rent and interest, amounting to the sum of two thousand and ninety-five dollars.

(8) That the referee in his report filed March 12th, 1913, decided that the city's claim for delinquent taxes was prior in right to your petitioners' lien for rent, to which report your petitioners filed exceptions on the 21st day of March, 1913.

3 (9) That on the 14th day of April, 1914, the said District Court, treating your petitioners' said exceptions as a petition to review the report of the referee, entered an order reversing the referee's decision and declaring the lien of petitioners to be superior to the claim of the city. That on the 23rd day of April, 1914, another order was entered granting a rehearing to the city and suspending the operation of said order of April 14th, 1914. And that, on the 19th day of June, 1916, another order was entered overruling the exceptions of your petitioners, sustaining and confirming the report of the referee, declaring the claim of the city for taxes to be superior to the lien of petitioners, and entering a

judgment against them for the sum of one hundred and twenty-seven and 83/100 dollars, being the sum necessary to add to the fund in bank to make up the amount of six hundred and ninety-four and 63/100 dollars, principal and interest, ascertained to be due to said city, such deficit having been caused by the payment on account to petitioners by the said order of July 14th, 1910.

Wherefore, your petitioners, feeling aggrieved because of the order of June 19th, 1916, declaring that the unsecured claim of the City of Richmond for delinquent personal taxes is superior to their lien for rent under their distress warrant aforesaid, ask that said order may be revised, in matter of law, by your honorable court, as provided in section 24-*b* of the Bankruptcy Law of 1898, and the rules and practice in such case provided.

ELIZABETH W. BIRD,
LOULIE W. NOLTING,
CHARLES E. WHITLOCK,
Petitioners.

JAMES E. CANNON,
Attorney for Petitioners.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, James R. Gordon, do hereby make solemn oath that I am the duly constituted agent and attorney in fact of the petitioners, Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, mentioned in the petition hereto attached, and that the state-
4 ment of facts therein contained is true to the best of my knowledge, information and belief.

JAS. R. GORDON.

Subscribed and sworn to before me, a notary public of the State of Virginia, in and for the City of Richmond, this 23rd day of June, in the year nineteen hundred and sixteen.

GRACE L. MILLER.

My commission expires Sept. 14, 1918.

Notice to Respondent to Demur, Answer, or Move to Dismiss.

Issued June 26, 1916.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

To City of Richmond, respondent:

Take Notice:

That you are required to demur, answer or move to dismiss the foregoing petition to superintend and revise, filed in this office in the above entitled cause on June 23, 1916, within fifteen days from this date, as required by Rule 36 of this court.

June 26, 1916.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.
By CLAUDE M. DEAN,
Deputy Clerk.

5 *Memorandum.*

A certified copy of the petition to superintend and revise, together with the original of the above notice annexed, were mailed to H. R. Pollard, Richmond, Va., counsel for the respondent, on June 26, 1916.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit,
By CLAUDE M. DEAN,
Deputy Clerk.

Answer of Respondent.

Filed July 8, 1916.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LULIE W. NOLTING, and CHAS. E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

Answer of the City of Richmond to the Petition Filed Herein on June 23, 1916, and Served on the Respondent June 26, 1916.

To the Honorable Judges of the Circuit Court of Appeals for the Fourth Circuit of the United States:

The City of Richmond, a municipal corporation, for answer to the petition exhibited herein against it, responds as follows:

1. The respondent says that the said petition should be dismissed upon the ground that the order complained of entered by the United States District Court for the Eastern District of Virginia on the 19th day of June, 1916, is not such an order as is contemplated by section 24 (*b*) of the Bankrupt Act, authorizing this honorable court to superintend and revise in the matter of
6 law the proceedings of the said District Court in bankruptcy, and is such an order as is contemplated by section 25 (*a*) subdivision 3 of the said Bankrupt Act, which requires that an appeal be taken within ten days after the judgment has been rendered.

2. This respondent further says that its charter and ordinances herein mentioned and the State statutes referred to make it manifest that the said order of the District Court was right and should be affirmed, and it prays that the said charter and ordinances, which are now here offered in evidence, may be treated by this court as a part of the record for all the purposes of this case. Respondent says that by sections 47, 48 and 49 of its charter it is provided that there should be a collector of the city taxes, who is charged with the duty of collecting all taxes and assessments levied by the city, and who is authorized to perform such other duties as may be prescribed by the charter or ordained by the City Council. It is also provided by section 51 of the said charter that the said collector shall turn over to the auditor of the city on the first day of February in each year all delinquent tax accounts for the preceding year, and it is made the duty of the Auditor to deliver the same to an officer known as the Collector of delinquent Taxes, who is required to perform such duties as may be prescribed by the Council, and who is vested with the same power to collect and by

the same means and processes all bills delivered to him as are conferred by the charter upon the Collector of Taxes. The Council is authorized by section 72 of the charter to vest the Collector of City Taxes with any or all of the powers now or hereafter vested in a sheriff as collector of State taxes and may prescribe the mode of his proceeding. The said charter was enacted by the General Assembly of Virginia and approved May 24, 1870, at which time the sheriffs of the Commonwealth were charged with the duty of collecting State taxes, a duty which has since been transferred to the treasurers of the various counties. By section 73 of the charter the legislature declared that:

"All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods or chattels shall prevent the same
7 from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

By section 74 of the charter it was provided that:

"Any payment of taxes made by the tenant, unless under an express contract contained in his lease, shall be a credit against the person to whom he owes the rent, and where any tax is paid by a fiduciary on the interest or profit of moneys of an estate invested under an order of the court, or otherwise, the tax shall be refunded out of such estate."

Respondent says that by these provisions of the State statutes all goods and chattels of a citizen wheresoever found were subjected to an inchoate lien for taxes assessed against the citizen, and that in case of a tenancy the landlord's right to rent was expressly subordinated to the city's claim for taxes and that this is the case also under the general statutes of the State. Pursuant to these provisions *of* chapter 14 of Richmond City Code 1899 was ordained by the Council. This chapter of the City Code, and especially sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 20 and 22, put into force the charter provisions above mentioned and are in all respects identical with the same sections of chapter 16, Richmond City Code 1910, except for some amendments which are immaterial. The fiscal year of the city begins on February 1st of each year in accordance with chapter 13, section 8, of the City Code, and under the provisions of the ordinances mentioned, the taxes are assessed and bills delivered to the Collector of City Taxes, who advertises that they are in his hands for collection annually for fifteen days prior to the 15th day of June in each year. Unless one-half of the taxes be paid before the 30th day of June, a penalty of 5 per cent is added to the amount charged. In like manner notice is given prior to the 15th day of December, and unless all taxes are paid on or before the 31st day of December a like penalty is added. All goods and chattels in the city belonging to persons assessed with taxes are made

8 liable to distress by section 8, and it is provided by section 7 that if all taxes be not paid before the first day of September, the collector shall distrain except where one-half has been paid prior to June 30th. It is also provided by section 11 that any person indebted to or having in his hands the estate of a party assessed with taxes may be required to pay said taxes out of the same, either in whole or in part, and shall be entitled to a charge or credit for so much on account of such debt or estate against the party assessed. Such persons may be summoned to court, if necessary, and from the time of the service of any such summons the taxes are made a lien on the debt due from such person or on the estate in his hands. If a person assessed with taxes in removing his property out of the city or intends to sell out or close out his business, the collector may, under section 20, distrain for such taxes, although the first day of September has not arrived, and although one-half has been paid. And, finally, the provisions of charter, section 73, above mentioned are expressly ordained. Under these ordinances the collector turns over to the Auditor all uncollected bills on the first day of February of each succeeding year, and the Auditor delivers them to the Collector of Delinquent Taxes, who is in express terms vested with the same power of collection and by the same means and processes as are authorized to the collector. The tax bills then become delinquent on February 1st of the year following the assessment and remain in the hands of the Delinquent Tax Collector until July 1st of the year following their delivery to him. Thus the tax of 1907 was payable on or before the 30th of June of that year, or with the penalty of 5 per cent added on or before the 31st of December, 1907. All goods and chattels of the taxpayer were subject to distress and could have been distrained at any time after February 1, 1907, if the emergency required, and at any time after September 1, 1907, in all cases. The tax became delinquent on the first day of February, 1908 and remained in the hands of the Collector of Delinquent Taxes until July 1, 1909, the goods and chattels of the taxpayer being liable to distress for the tax of 1907 in the meantime. Thereafter, the tax bill for 1907 was delivered to the Auditor, in whose custody it remained until paid or otherwise disposed of by proper authority, but the goods and chattels of the taxpayer, if any, still remained

9 liable to distress for the amount due. It will be observed that section 73 of the charter contains no time limit for distress. The inchoate lien for personal taxes thus given is in this particular identical with the lien for real estate taxes given by section 75 of the charter, which simply gives the lien without a time limit, and this section was held by the Supreme Court of Appeals of Virginia to give a perpetual lien in the case of Powell's Executor vs. Richmond, 94 Va. 80, thus affirming the principle that where a lien is perpetual by statute or is intended to continue until taxes are paid, no statute of limitations or delay in enforcement can be invoked against proceedings to enforce the lien. Or, in other words, nullum tempus occurrit regi. This principle is affirmed in Cooley on Taxation, 2nd Edition, page 448, 37 Cyc. 1147, 28 Cyc. 304 and 3rd Dillon Municipal corporations, section 1194, p. 1902. It fol-

lows, therefore, that when the landlord distrained on November 1st, 1909, for the year and a half rent due, for the lease was from April to April, at the rate of $2,000.00, the goods and chattels levied on by him were subject to the inchoate lien of the city for $169.00, the balance of the taxes of 1907 due by his tenant. They were also liable to the lien of the city for $294.00, the taxes of 1908, which were not paid and still in the hands of the Collector of Delinquent Taxes for collection by distress. They were likewise subject to the same lien for $294.00, the taxes for 1909, which were current taxes, and had not even become delinquent, but were still in the hands of the Collector of Taxes, to whom under the ordinances the tenant might pay the same on or before December 31, 1909. The taxes for 1910, $37.63, had not even been assessed on November 1, 1909, when the distress was levied by the landlord, and are taxes payable by the court on property in its hands. It will be observed a petition was filed in the Chancery Court of the City of Richmond for the appointment of receivers on November 3, 1909, and receivers were appointed on November 4, 1909. It is true a petition in involuntary bankruptcy was filed on November 6, 1909, followed by an order of adjudication on February 3, 1910, but the property was none the less in the hands of the receiver of the Chancery Court at the time it became liable for the taxes of 1910, on February 1st of that year, and came into the receiver's possession on November 4, at a time when the taxes of 1909 were current taxes, and the taxpayers still had until December 31, 1909, within which to pay them. As already stated, the taxes for 1908 were still in the hands of the Collector of Delinquent Taxes and along with the taxes for 1907 were collectible by distress. Of course, the appointment of the receivers on November 4, 1909, prevented the city and collector from levying the distress warrant, but under the decisions in this circuit the inchoate lien arising out of the liability to distress must be treated as a valid and perfect lien without actual levy. That the property was subject to taxation is plain from V. C. sections 491, 492 and 493, and by the express mandate of the statute, section 492 (*b*), Acts 1897-8, page 825, every court in the Commonwealth was forbidden to enter any order or decree directing the payment or distribution of funds or property under its control or under the control or in the hands of any receiver or officer of the court until all taxes and levies upon such property were paid, without providing for such payment, and all officers are forbidden to pay out any such funds unless a receipt for the taxes showing that they were paid was produced before him. It thus appears, we think, that the city was given an unlimited inchoate lien for its taxes on the goods and chattels of the bankrupt. The lien thus given by the specific charter provisions mentioned is also given by section 622, et sequa, of the Code. That section provides that any goods or chattels of the person in the city may be distrained by the collector, and that in all cases property subject to distress shall be liable in the hands of any person. This being so, it is of great importance to note that section 2791 of the Code, prescribing what goods may be levied upon for rent by distress, is expressly controlled

by the last provision of section 2792, which declares that the power of distress thus given shall not affect any lien for taxes. It thus appears that the landlord's right to distrain is qualified by the provision that he shall distrain subject to the lien of the city and state for taxes, levies or military fines. As a consequence, it follows that the landlord in this case could not by a levy supplant the inchoate lien of the city for its taxes. It is incontrovertible, and indeed was admitted, that the taxes for 1910 should be paid in preference to the landlord. This cannot be so unless the landlord's lien is subordinate to the rights of the city and state. It was not admitted, but we think it must be admitted, that the taxes for 1909, which
11 were the taxes of the current year at the time of the levy by the landlord and of the receivership, must also be paid in preference to the landlord, and since his right of distress by express statute cannot affect any lien for taxes or levies, it follows that his levy was subject to the prior rights of the city and state for 1907 and 1908. It is certain that the receivership of November 4, 1909, and the bankruptcy of November 6, 1909, and February 3, 1910, prevented a levy for the taxes, and it is equally certain that the goods and chattels were subject to levy, though as stated, no levy was necessary because of the receivership and of the custody of the court.

3. The District Court ordered a sale on March 22, 1910, and on April 29, 1910, confirmed the report and account of sales whereby a total of $3,343.02 was realized. Of this there has been paid on account of attorney's fees, costs, etc., $674.67, and to the petitioners on account of rent the sum of $2,095.00, while the city has received nothing on account of its taxes, notwithstanding the schedule itself reports the rent claim after the taxes and under the heading No. 4, "Other debts which have priority by law."

Apart from a question of lien under the State statutes, your respondent claims that the Bankrupt Act itself places the claims of the city and State before that of the landlord, and that the taxes due must be paid, even though there is not a lien therefor under the State statutes, and although there is a lien under them for the rent. No State statute can override the clear provisions of the acts of Congress, and section 64 (*a*) of the Bankrupt Act must control a State statute if a conflict exists. Relying, therefore, upon the decisions of the Supreme Court of the United States in the case of New Jersey vs. Anderson, 203 U. S. 483, and of the Circuit Court of Appeals in Waco vs. Bryan, 127 Fed. 80, and Chattanooga vs. Hill, 139 Fed. 601 and other cases which will be cited, your respondent says that section 64 (*a*) of the Bankrupt Act intends to enact and does enact into law the well known principle which governs all courts in the administration of estate requiring the payment of taxes before any distribution of the funds to creditors. This principle is expressly adopted by statute in Virginia in section 492 (*b*) of the Code,
12 and it is now enacted also by Congress in section 64 (*a*) of the Bankrupt Act. If other authorities were needed your respondent would rely upon the opinion of Chief Justice Fuller in 149 U. S., p. 184, re Tyler, citing with approval Greeley vs. Providence

Savings Bank, 98 Mo. 458-60, and the opinion of Whittle, J., in Taylor vs. Sutherlin-Meade Co., 107 Va. 787. As said by Mr. Justice Day in 203 U. S. 489, supra: "The requirement of the present law is a wide departure from the Act of 1867 and specifically requires a trustee to pay all taxes legally due and owing without distinction between the United States and the State, county, district or municipality." It is because taxes are not debts and the United States, states and cities are not creditors that taxes need not be proved and that tax claimants have no voice in the selection of the trustee.

New Jersey vs. Anderson, 203 U. S.;
Lane Land Company vs. Oregon, 7 Wallace 71;
Swarts vs. Hamner, C. C. A. (8th Circuit), 56 C. C. A. 92, affirmed 194 U. S. 91.

This being so, and because this is so, since neither the United States, nor the state, nor the city have any voice in the appointment of the trustee or management of the bankrupt estate, section 64 (*a*) of the act specifies a distinct order of priority as stated in 2 Remington on Bankruptcy, page 1319, et sequa, where the learned author also says that it is incorrect to say, as is said in re Veitch, 4 A. B. R. 112, that taxes come under section 64 (*b*) (5) in the order of priority. It would be deprived of all meaning if taxes were comprehended in that section, re Stalker 10 A. B. R. 713, 123 Fed. 961. "The significance of section 64 (*a*) is that a claim of taxes is paramount to all other claims, because of the peculiar needs and requirements of the municipality. The right to such priority belongs solely to the state or municipality." 2 Remington, section 2148, page 1325. A contest then between a landlord and a city or state or the United States is not a contest between creditors, for taxes are not debts, and the city and state are not creditors. It is not a case, therefore, in which there is a race of diligence, but the city and state stand on exactly the same plane as the United States, as is directly held in New Jersey vs. Anderson, and the taxes due are paramount to all other claims, regardless of whether under the state law there is a lien for the taxes or not.

13 State vs. Rowse, 49 Mo. 586;
Re Tilden, 91 Fed. 500;
Re Weissman, 178 Fed. 115;
Swarts vs. Hamner, 194 U. S. 444;
New Jersey vs. Anderson, 203 U. S. 483;
Chattanooga vs. Hill, C. C. A., 15 A. B. R. 195;
Waco vs. Bryan, C. C. A., 127 Fed. 80, 11 A. B. R.;
Cooper Grocery Co. vs. Bryan, C. C. A., 11 A. B. R. 734.
Collier on Bankruptcyfi pp. 889-891-892-895.

For these reasons, as well as for others apparent upon the record, and which will be hereafter advanced, this respondent insists that the

petition should be dismissed and the decision of the District Court affirmed.

THE CITY OF RICHMOND,
By GEORGE AINSLIE, *Mayor.*

Teste:
J. M. PACE, *Treasurer.*

[SEAL.] GEORGE WAYNE ANDERSON,
Assistant City Attorney and
Solicitor for the Respondent.

STATE OF VIRGINIA,
City of Richmond, To wit:

This day personally appeared before me, Richmond T. Lacy, a notary public in and for the city and state aforesaid, George Ainslie, Esq., who, being first duly sworn, made oath that he is the Mayor of the City of Richmond, and that the facts and things stated in the foregoing answer are true to the best of his knowledge and belief.

Given under my hand this 7th day of July, 1916.

My commission expires on the 12th day of September, 1916.

RICHMOND T. LACY, JR.,
Notary Public.

14 TRANSCRIPT OF RECORD.

Filed Aug. 2, 1916.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, Begun and Held at the United States Court-room, in the Post Office Building, in the City of Richmond, Virginia, on the First Monday in the Month of April, Being the Third Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In the Matter of AINSLIE CARRIAGE COMPANY, Bankrupt.

In Bankruptcy.

Report of Referee, Dated July 13th, 1910.

Filed July 14th, 1910.

To the Honorable Edmund Waddill, Jr., Judge:

The undersigned, your referee in bankruptcy, for the Third Division of said district, to whom the above-entitled matter was referred, begs to report:

That from the trustee's report, filed July 12th, 1910, it appears that he has collected most of the accounts due the bankrupt's estate, and, it further appears from said report that he has collected from this source $1,832.08, and of this amount has disbursed $1,068.71, leaving a balance of the money derived from this source of $763.37;

That he has deposited $750.00 of this balance in bank to
15 the credit of court, in this matter, retaining $13.37 to cover small current expenses incident to closing up the estate;

That it also appears from the record in this matter that the net amount realized from the sales of property was $2,432.25, making a total amount now in bank to the credit of court of $3,182.25;

That it further appears from said report that said trustee has collected most of the accounts due the estate, it appearing that $400.00 is about all that he thinks can be realized from such accounts as he still has in his hands;

That such being the case, your referee recommends that the fund now in bank be distributed to those entitled thereto;

Your referee further begs to report that the claims for taxes and rent which have been filed herein amount to $4,517.10; exclusive of interest, and it is, therefore, clear that the fund will not be sufficient to pay the claims in full, to say nothing of the costs and fees;

That said claims are as follows:

T. C. Walford, Collector Delinquent Taxes.....	$657.00
Commonwealth of Virginia, for Franchise Tax and Registration Fee	97.10
James R. Gordon, agent for Elizabeth W. Bird, et als., rent and interest on the amount of his claim as set forth therein	3,762.90
	$4,517.00

In regard to the rights of these creditors to participate in the distribution of this fund, your referee begs to report that he is of opinion that the claim for rent should participate first, because the record shows that the landlord had perfected a lien for $2,929.57 of the same before bankruptcy by levying a distress warrant as provided by the Code of Virginia, and the balance of $833.33 is a charge upon the estate by reason of the fact that it is rent due for the period of occupancy by the receiver of the Chancery Court and the trustee in bankruptcy; however, so far as the taxes due said Walford are concerned, it has been agreed by counsel for the landlord and the city attorney of the City of Richmond, Virginia, that the amount of this claim for taxes be held in bank pending the adjudication by
16 the Supreme Court of Appeals of this State of the question, whether the State or city has a lien for their taxes; in regard to the claim of the Commonwealth of Virginia for taxes in the way of franchise tax and registration fees, your referee begs to report that the question of whether such charges are covered by section 64 of the Bankrupt Act has been decided by the Supreme Court of the United States in favor of the State, but unless the State has a lien for such

taxes, the landlord's claim for rent should be paid first, because he has perfected his lien. Your receiver would recommend, therefore, that the amount of this claim be left in bank also;

Your referee further begs to report that, subject to the approval of the court, he has made the following allowances to the trustee and attorneys connected with this matter:

To O'Flaherty & Fulton and Stern & Stern, counsel for petitioning creditors	$150.00
To Cutchins & Cutchins, counsel for bankrupt	100.00
To John Howard, counsel for trustee	150.00
To John P. Lea, trustee	127.84
	$527.84

And the costs due the clerk of this court and your referee are as follows:

Joseph P. Brady, clerk	$8.20
Thomas B. Snead, referee, for mailing and publishing notice first meeting of creditors, for filing 48 proofs of claims and one per cent on money distributed to creditors	54.83
	$63.03

making a total of costs and fees of $590.87.

Your referee begs to report further that counsel for the landlord contends that the fund in this matter should be so marshalled as to allow the said amount of $750.00, which was realized from the collection of accounts, to be paid as a credit upon the landlord's claim of $833.33 against the receiver of the Chancery Court and
17 the trustee herein, and since said amount was a part of the actual and necessary cost of preserving the estate, your referee is of opinion that under section 64-*b* (1) of the Bankrupt Act said amount of $750.00 should be so applied;

That after deducting the total amount of the two claims for taxes which should be left in bank for the present, and paying cost and such compensation to counsel in this matter as the court shall allow, and the trustee's commissions, the balance of the fund in bank should be applied upon the lien for rent of J. R. Gordon, agent for Elizabeth W. Bird, et als.;

Your referee also begs to call attention to the fact that the costs incident to the receivership in the Chancery Court have been paid;

All of which is respectfully submitted for review by the District Judge.

THOS. B. SNEAD,
Referee in Bankruptcy.

Dated at Richmond, Va., July 13th, 1910.

Order Paying Rent, Attorney's Fees, Costs, Etc.

Entered and Filed July 14th, 1910.

On motion of John P. Lea, trustee, his report dated July 11th, 1910, is hereby filed and also the report of Thomas B. Snead, referee in bankruptcy in this case, dated July 13th, 1910, and there being no exceptions to the report of John P. Lea, trustee, the same is hereby approved and confirmed; and the creditors this day having appeared in court and filed an exception in writing to the report of the said Thomas B. Snead, referee, because it allows more than one year's rent to Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock for rent on the premises occupied by said bankrupt company, known as Nos. 8, 10, 12 South Eighth Street, in the City of Richmond, Virginia; and the court now, without passing upon said exception and allowing the claim of the said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock for one year's rent at this time, with interest thereon to date, proceeding to award counsel fees, commissions to the trustee in bankruptcy herein and costs,

doth adjudge, order and decree that Joseph P. Brady, clerk
18 of this court, do check on the fund in the Planters National Bank to the credit of the court in this cause in favor of the following named persons for the amounts set opposite their several respective names, viz:

Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock or James E. Cannon, their attorney.....	$2,095.00
O'Flaherty & Fulton, amount advanced by them as filing fees	30.00
O'Flaherty & Fulton and Stern & Stern, attorneys for petitioning creditors	150.00
Cutchins & Cutchins, attorneys for bankrupt	100.00
John Howard, attorney for trustee	150.00
John P. Lea, trustee, as commissions	127.84
Joseph P. Brady, clerk	8.20
Thomas B. Snead, referee, his fee for notices of meeting of creditors and filing proofs of claims.....	54.83

All of said checks to be countersigned by Thomas B. Snead, referee in bankruptcy.

And the court doth declare that the said sum of $2,095.00, rent as aforesaid, shall be charged upon the assets of the bankrupt company in the following proportion, namely: $873.33 upon the proceeds of the book accounts, $1,221.67 upon the proceeds of the tangible personal property, but in apportioning the rent herein it is done without prejudice in any way to the rights of the creditors.

EDMUND WADDILL, JR.,
United States District Judge.

Richmond, Va., July 14th, 1910.

Referee's Report Upon Claim for Rent and Taxes.

Filed March 12th, 1913.

The undersigned, your referee in bankruptcy, for the Third Division of said district, to whom the above-entitled matter was referred, begs to report as follows:

That, as will appear from his report, dated and filed July 14th, 1910, by agreement of counsel for the landlords in this matter, and the city attorney of the City of Richmond, the question of whether the landlords who claim to have a lien upon certain of the bankrupt's property, or the State of Virginia and the City of Richmond should participate first in the distribution of the bankrupt's estate, was left open for determination, pending the adjudication by the Supreme Court of Appeals of Virginia in a certain suit then pending therein of the question, whether the State or city had a lien for their taxes, which case, when decided, it was hoped would be a guide in determining the questions involved in this controversy. Since that time, however, this case has been disposed of by the Supreme Court of Appeals, upon a question of jurisdiction and without touching upon the questions in issue here, and your referee is now requested by counsel for all parties to this controversy to report his findings upon the same to the court; and, accordingly, your referee further begs to report to the court his conclusions of fact and law upon the questions here involved, and the same are as follows:

The facts are that on Nov. 1, 1909, and within four months preceding the date of adjudication of bankruptcy in this matter, said adjudication having taken place on the 3rd day of February, 1910, the landlords levied a distress warrant upon certain of the bankrupt's property for rent, amounting to $2,929.57, and on the same day levied an attachment for rent upon certain of the bankrupt's property for the further sum of $833.33, and following bankruptcy, they proved their claim in this matter for the above mentioned amounts claimed to be due them for rent, and set forth in their proof of claim that, by virtue of said distress warrant and attachment proceedings, they possessed a good and sufficient lien for their rent, and that during the course of this proceeding the State of Virginia filed their claims for taxes in the sums of $97.10 and $657.00, respectively, claiming that they were entitled to be paid their taxes in advance of the payment of the claims of any creditors, and asserting that the liens claimed by the landlords having been obtained within four months before bankruptcy, were discharged by virtue of section 67-*f* of the Bankruptcy Act;

And the question for determination here is whether, by virtue of the liens obtained through said distress warrant and attachment proceedings, the landlords have a claim for rent which is superior to the claims of the State of Virginia and City of Richmond for taxes, and, upon a second and careful consideration of the matter, your referee is of the opinion that the landlords' claim

is not superior to those of the State of Virginia and the City of Richmond for taxes;

When this matter was first brought to your referee's attention he was of the opinion that the landlords were entitled to participate in the distribution of the bankrupt's estate before the State of Virginia and the City of Richmond for their taxes, and so expressed himself in his said report of July 14th, 1910, but, upon a second consideration of the matter, he has found it necessary to change his opinion;

So far as the liens obtained through the distress warrant and attachment proceedings are concerned, it seems only necessary to say that the same are void under and by virtue of section 67-*f* of the Bankrupt Act, which provides that "all levies, judgments, attachments or other lines, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate." In this connection see also Westside Paper Co., 20 Am. B. R. 289; in re Dougherty, 109 Fed. 480, and in re Consumers Coffee Co., 18 Am. B. R. 500. This being the case, it follows then that by virtue of section 64 of the Bankrupt Act, the State of Virginia and the City of Richmond are entitled to participate in the distribution of the bankrupt's estate for their taxes ahead of the landlords for their rent; rent, under this section of the act, being relegated to the fifth subdivision of the same;

For the further information of the court, your referee submits herewith a recapitulation of the total amount realized from all sources by the trustee, how so much of the same as has been disbursed has been disposed of, and the balance now in bank:

21 *Recapitulation.*

To total amount realized by trustee from all sources.... $3,343.02

By Disbursements made under order of court, as follows:

July 14th, 1910.

To Elizabeth W. Bird, Loulie W. Nolting and Chas. E. Whitlock, upon account of their claim for rent	$2,095.00	
Brought forward	2,095.00	3,343.02
To O'Flaherty & Fulton, Attys., filing fees advanced by them	30.00	
To O'Flaherty & Fulton and Stern & Stern, Attys., for petitioning creditors	150.00	
To Cutchins & Cutchins, attys., counsel for bankrupt	100.00	
To Jno. Howard, counsel for the trustee	150.00	
To Jno. P. Lea, trustee, commissions as such	127.84	
To Joseph P. Brady, clerk, costs	8.20	
To Thos. B. Snead, referee, costs	54.83	

June 30, 1911.

To Jno. Howard, counsel for trustee	50.00	
To Jno. P. Lea, trustee, additional commissions allowed him as such	3.80	
		2,769.67
Balance in bank		$573.35

And said balance, after paying balance of costs due and unpaid, should be applied, first, to the liquidation in full of the claim of the State of Virginia for taxes, and the balance then remaining as a credit upon the claim of the City of Richmond for taxes;

Your referee further begs to report that he knows of no further costs still due in this matter, except an item of $1.50 due Miss M. Heeke for services in taking depositions;

22 All of which is respectfully submitted for review by the District Court.

THOS. B. SNEAD,
Referee in Bankruptcy.

Dated at Richmond, Va., March 12th, 1913.

Exceptions of Elizabeth W. Bird and Others to Referee's Report.

Filed March 21st, 1913.

The said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock except to the said report of Referee Snead, dated March 12th, 1913, because it gives to the State of Virginia and to the City of Richmond a lien upon the fund under the control of the court prior to the lien of said exceptants as landlords of said bankrupt.

ELIZABETH W. BIRD,
LOULIE W. NOLTING,
CHARLES E. WHITLOCK,
By JAMES E. CANNON, *Counsel.*

Order Reversing Ruling of Referee and Establishing Claim of Landlords for Rent.

Entered and filed April 14th, 1914.

On consideration of the report of Referee Thomas B. Snead, dated and filed on the 12th day of March, 1913, and of the exceptions thereto of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, filed on the 21st day of March, 1913, (which said exceptions are treated as a petition to review the said report), the court, having maturely considered the arguments of counsel, is of the opinion, for reasons stated in writing and filed with the record, that the lien of the said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, for rent, is superior to the claims of the State of Virginia and the City of Richmond, respectively, for delinquent taxes assessed against the goods and chattels of the Ainslie Carriage Company, bankrupt, and the court doth accordingly reverse the ruling of the referee, as set forth in his report aforesaid, and
23 doth adjudge, order and decree that the said landlords, by virtue of their lien for rent aforesaid, are entitled to the fund to the credit of the court arising from the sale of the goods and chattels of the said bankrupt, subject to the payment of costs in this cause now remaining unpaid.

And the court doth accordingly order that Joseph P. Brady, clerk of this court, do draw his checks upon the fund on deposit in the Planters National Bank to the credit of the court in this cause (said checks to be countersigned by Thomas B. Snead, referee) in favor of the following named persons for the amounts set opposite to their names, respectively, as follows:

Miss M. Heeke, in full of services for taking depositions	$1.50
Clarence J. Smithers, United States marshal, in full for services of said marshal	4.00
Joseph P. Brady, clerk, in full for his services herein	1.05

Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, or James E. Cannon, their attorney, on account of their claim for rent..... 566.80

Making a total of..... $573.35

EDMUND WADDILL, Jr.,
U. S. District Judge.

Richmond, Va., April 14th, 1914.

Petition of City of Richmond for Rehearing.

Filed April 23rd, 1914.

To the Hon. Edmund Waddill, Jr., Judge:

Your petitioner, the City of Richmond, by its attorney, respectfully prays that the decree entered herein on the 14th day of April, 1914, denying the claims of the City of Richmond and State of Virginia, to priority of payment of the arrears of taxes due them, respectively, over the claims of the defendants as landlords for rent due by the bankrupt, be set aside and that a rehearing be
24 granted to your petitioner of the several points involved in this controversy, upon the following grounds:

1st. That by reason of fortuitous circumstances, your petitioner had no opportunity to see or reply to the brief filed on behalf of the defendants in this case, although no blame is imputed to them on that account, but in view of the importance of the question involved to the City of Richmond, it is respectfully urged that a full argument of the questions involved ought to be had.

2nd. The decree seems to be predicated upon the proposition that the city is without a lien for its taxes, whereas chapter 16, section 10 of Richmond City Code, 1910, expressly grants a lien on and after the first day of February of the year in which said taxes are assessed.

3rd. An investigation of the records in the case of Jackson Coal Co. v. Phillips, 114 Va. 40-50, has disclosed the fact that the City of Petersburg was not represented in argument and did not file a brief in the cause, but it is submitted that even though this case may rightly decide the rights of Petersburg under its charter and ordinances, that it has no necessary bearing upon the rights of the City of Richmond under its peculiar charter and ordinances. This case was relied upon by the defendants and is cited in the decree, as was also the case of Marye v. Diggs, 98 Va. 748. This latter case related exclusively to taxes on real estate and not upon personalty, as in the case at bar, and was decided December 6th, 1900. In response to it the General Assembly of Virginia on the 14th day of February, 1901, amended section 456 of the Code of Virginia so as to overthrow the decision in Marye v. Diggs, and to authorize the suit in equity to enforce a tax lien which that decision denied.

Many decisions may be cited of the Federal courts and citations made from text writers to the effect that the Bankrupt Act itself places the claim for taxes of the United States and of a State and municipality above lien creditors, and the decision in N. J. v. Anderson, 203 U. S. 483, expressly holds that a lien is not necessary to give the State or municipality the priority awarded to it by the Bankrupt Act.

In view of the wide importance and far-reaching consequences of the decree mentioned and for the reasons above set forth as well as for others which might be given, your petitioner respectfully prays that the decree may be set aside and a rehearing be granted o it upon the questions involved in this controversy.

Respectfully submitted,

CITY OF RICHMOND,
By COUNSEL.

GEO. WAYNE ANDERSON,
Assistant City Attorney.

Order Granting Rehearing.

Entered and Filed April 23rd, 1914.

Came this day the City of Richmond, by its attorney, and by leave of court filed its petition asking that the decree entered herein on April 14, 1914, be set aside and that a rehearing be granted on the several matters involved in this cause. And thereupon this cause came on to be heard upon the said petition and was argued by counsel. On consideration whereof, the court being of opinion that the prayer of the said petition should be granted, it is adjudged ordered and decreed that the said decree of this court in this cause entered on the 14th day of April, 1914, be set aside for the present and that a rehearing of the several matters and things involved therein be granted to the City of Richmond. Whereupon, this cause is continued generally for the purpose of such rehearing.

EDMUND WADDILL, JR.

Richmond, Va., April 23rd, 1914.

Conclusions of the Court.

Filed April 21st, 1916.

WADDILL, *District Judge:*

The question presented on the application for rehearing is as to the priority of delinquent taxes due by the bankrupt to the City of Richmond, over the rent claim of the landlord, who levied his distress warrant within four months of the bankruptcy, the City of Richmond not having made distraint and sale for such taxes.

Upon the rehearing, the case was argued with unusual ability by Mr. George Wayne Anderson, the assistant city attorney, and Mr. James E. Cannon, attorney for the landlord, and the question presented is one of considerable difficulty.

The conclusion of the court, after mature consideration, is that the rehearing asked for should be allowed, and the former decision, following the case of Jackson Coal & Coke Co. v. Phillips, 114 Fed. 40, 50, which gave the rent claim precedence over the city for its taxes, should not be adhered to, and that, on the contrary, the city should be decreed to have priority over the landlords' claim for the amount of its arrearages of taxes, as to which the city's right of distraint and sale existed. In the Jackson Coal & Coke Co. case supra, it was held that no lien existed for arrears of city taxes, under the ordinances of the City of Petersburg. But that seems not to be the case as to the City of Richmond, where the right of distraint and sale exists as well for delinquent as for current taxes. It was insisted with much force in behalf of the landlord's lien that the city had no express lien for its taxes in arrears; but only a right of distraint and sale therefor; and hence, until distraint is made that the landlord's lien for rent, where a distress warrant was issued, as here, took precedence over a claim for taxes.

This, the court thinks, in the administration of an estate in bankruptcy, is too narrow a view of the law. Under decisions in bankruptcy, certainly in this district, in In re Winn, Fed. Cas. 18, 117, 3 Fed. Cas. 752, 761, a decision of Chief Justice Chase, under the act of 1867, and in re Hyman, 226 Fed. 982, under the act of 1898 (both decisions from this district) it is held that it is not necessary to sue out a distress warrant to protect the landlord's lien for the current year's rent, but the court will recognize such claim, whether the distress warrant was sued out or not; and it follows that taxes for which a lien is given by statute, upon making distraint therefor, should be treated in like manner. To deny to the City of Richmond a lien of priority for arrears of taxes, where the right of distraint and sale existed, because its officials had failed to make
27 distraint, would be to place the sovereignty in a less favorable position than the landlord, who held a like inchoate right of lien for his rent. And this becomes the more apparent when the landlord's lien for the current year's rent upon property found on his premises, or removed therefrom, not more than thirty days, is expressly made "subject to the prior lien for taxes, levies or militia fines." Under the decisions of this court, supra, no advantage is gained by the *land* by the issuance of the distress warrant, but his rights are respected and enforced by reason of the statutory lien recognized under the local decisions. He can, it is true, sue out a distress warrant; but, as in this case, the same having issued within four months of the bankruptcy, would fail, save by reason of the inchoate lien upon which it was founded; and a like right should be recognized in favor of the city for arrearages of taxes due to it, as to which a right of distraint existed and had not been exercised.

The court is not unmindful of the fact that the landlord's

right by virtue of his inchoate lien, is recognized, in absence of distraint, for only the current year's rent; whereas, there is no limitation apparently upon the city's right of distraint for its past and present taxes. This unlimited right of distress on the part of the city may, in some cases, work hardship; and the court does not mean to say that in the administration of a bankrupt's estate, it would not be proper in its discretion to place a reasonable limitation upon the time in which the city's right should be enforced, as respects such arrears of taxes.

The present case is not one in which the court should deny to the city its claim to priority for taxes as between itself and the claim of another lien or for rent. In other words, the arrearages of taxes are not of such duration as would warrant the court in rejecting any portion thereof, under the facts of this case.

Final Order.

Entered and Filed June 19th, 1916.

This day this cause came on again to be heard on the papers formerly read and on the petition of the City of Richmond filed herein on the 18th day of June, 1914, praying that the decree entered herein on the 14th day of April, 1914, sustaining the
28 exceptions to the report of Referee Thomas B. Snead, dated and filed on the 12th day of March, 1913, and giving the landlords of the bankrupt, Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, priority of payment for their rent claims over the claims of the City of Richmond and State of Virginia for arrears of taxes due them, respectively, should be set aside and a rehearing granted to the said city, and was argued by counsel.

On consideration whereof, the court being of the opinion that the said decree of April 14, 1914, should be set aside and annulled, it is ordered that the same be done accordingly; and the court being further of opinion for reasons given in writing that the claims of the City of Richmond for taxes in arrears are entitled to priority over the claims of the said landlords for rent, the court doth accordingly overrule the exceptions to the said report of Referee Thomas B. Snead, filed on the 21st day of March, 1913, by the said landlords, and doth sustain and confirm the said report in so far as it grants priority of payment of the said taxes over the said rent claim. And it appearing to the court that a manifest error was committed in the order of this court of July 14, 1910, by the payment of $2,095.00 to the said landlords on account of rent due and to become due, before the said taxes due the city were paid, and in the failure to retain to the credit of the court in this cause an amount sufficient to pay the said taxes in full in accordance with the agreement between counsel, set forth in the report of the Referee herein, dated July 14, 1910, on which report the said order of this court of that date was based, the court doth adjudge, order and decree that the said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock do forthwith pay into the Planters National Bank of

Richmond, Virginia, to the credit of the court in this cause, the sum of $127.83, which amount is the necessary refund out of the payment made to them on January 14, 1910, aforesaid, in order to retain to the credit of this court a sum sufficient to pay the taxes due the City of Richmond in full in accordance with the said agreement, and that they file a certificate of the said deposit with the clerk of this court. And the court doth further order that Joseph P. Brady, clerk of this court, shall thereupon draw his checks upon the fund on deposit to the credit of the court in this cause, in the Planters National Bank, which checks shall be countersigned
29 by Thomas S. Snead, referee, in favor of the following named persons for the amounts set opposite to their names, respectively as follows:

Miss M. Hecke, in full for services for taking depositions..	$1.50
John G. Saunders, U. S. marshal, in full for services of said marshal.....	4.00
Joseph P. Brady, clerk, in full for his services herein.....	1.05
T. C. Walford, collector of delinquent taxes for the City of Richmond, account of taxes for 1907, 1908, 1909 and 1910	694.63
Making a total of.....	$701.18

EDMUND WADDILL, JR.,
U. S. District Judge.

Richmond, Va., June 19, 1916.

Stipulation of Counsel as to Record.

Filed August 2nd, 1916.

It is hereby stipulated and agreed between the undersigned counsel that the following described papers in the above matter shall constitute the record in the matter of the petition of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock to superintend and revise in matter of law, filed in the United States Circuit Court of Appeals for the Fourth Circuit, on June 23, 1916:

1. Report of Thomas B. Snead, referee in bankruptcy, dated July 13, 1910, and filed July 14, 1910.
2. Order entered July 14, 1910, distributing money.
3. Report of Thomas B. Snead, referee in bankruptcy, dated March 12, 1913, and filed same day.
4. Exception of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock to report of Referee Thomas B. Snead, dated March 12, 1913.
30 5. Order of District Court, entered April 14, 1914, reversing ruling of Referee Snead in his report of March 12, 1913, and establishing claim of landlords for rent.
6. Petition of the City of Richmond asking for a rehearing.
7. Order setting aside order of April 14, 1914, and granting a rehearing on the matters therein involved.

8. Order entered June 19, 1916, finally setting aside order of April 14, 1914, and granting priority to the tax claim of the City of Richmond.

9. Conclusions of the court upon which are based the order of June 19, 1916.

JAMES E. CANNON,
JOHN T. WINGO,
Attorneys for Elizabeth W. Bird, Loulie W. Nolting, and Charles E. Whitlock, Petitioners.
GEO. WAYNE ANDERSON,
Atty. for City of Richmond, Respondent.

August 2nd, 1916.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a true transcript of the record made in accordance with stipulation of counsel as appears herein, in the matter of Ainslie Carriage Company, bankrupt.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at the City of Richmond, Virginia, this 2nd day of August, A. D. 1916.

[SEAL.] JOSEPH P. BRADY,
Clerk United States District Court,
Eastern District of Virginia.

31 & 32 *Docket Entries.*

June 23, 1916, appearance of James E. Cannon for the petitioners is entered.

July 8, 1916, appearance of George Wayne Anderson for the respondent is entered.

November 15, 1916 (November Term, 1916), cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

33 *Opinion.*

Filed March 14, 1917.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

versus

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

(Argued November 15, 1916; Decided March 14, 1917.)

Before Pritchard, Knapp and Woods, Circuit Judges.

James E. Cannon for Petitioners, and George Wayne Anderson, Assistant City Attorney, for Respondent.

PRICHARD, *Circuit Judge:*

This is a controversy between the landlords of the bank-
34 rupt, Ainslie Carriage Company, claiming a lien upon the bankrupt's assets by virtue of a distress warrant for rent, levied on November 1, 1909, and the City of Richmond claiming priority over the landlords by virtue of certain bills for delinquent personal taxes assessed against the bankrupt for the years 1907, 1908 and 1909, and for current taxes for the year 1910, being the year in which the adjudication in bankruptcy was made.

It is conceded that the landlords levied a distress warrant on the 1st day of November, 1909, and that the City of Richmond made no effort to levy for its delinquent taxes for the years 1907, 1908 and 1909, although given the express power to do so by Section 73 of its Charter in the following language:

"All goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon * * *."

It appears from the answer of the City of Richmond that the ordinances of the City provide that the taxes for each year are payable on or before June 30th, and, under Chapter 14, Section 7, of Richmond City Code, it is provided that, if all taxes be not paid before September 1st, the Tax Collector shall distrain except where one-half has been paid prior to June 30th.

The situation of the parties on November 1, 1909, may be summarized as follows: The landlords, in pursuance of Chapter 127 of

the Code of Virginia, had distrained for rent to the extent of $2,929.57, at the rate of $2,000.00 per annum. Section 2787 of the Code of Virginia provides that rent of every kind may be recovered by distress on action; Section 2790 that rent may be distrained for within five years from the time it became due, and Section 2791 that distress may be levied on any goods of the lessee, or his assignee, or under tenant, found on the premises, or which have been removed therefrom not more than thirty days. Under the provisions of its Charter the City of Richmond had a right to distrain for taxes due in 1907 on the 1st day of September, 1907, and at any time thereafter; likewise for its 1908 taxes on the 1st day of September, 1908, or any moment thereafter, and for its 1909 taxes it had the same right, all of which continued until the time the landlords made their levy.

35

It is contended by the landlords that inasmuch as they exercised their right of distress, and that the City did not exercise its right to levy and collect, that they acquired a lien upon the bankrupt's assets superior to that of the City. On the other hand, the City claims that its inchoate and unexercised right of distraint gives it a priority over the landlords, and, furthermore, under the Bankruptcy Act, Section 64 (*a*), the taxes are given priority over all other claims.

It appears that the adjudication in bankruptcy was made on the 3rd day of February, 1910, or less than four months after the levy of the landlords, and one of the contentions of the City is that, therefore, under Section 67 (*f*) of the Bankruptcy Act, the landlords were not entitled to any lien at all. The referee made a report under date of July 14, 1910, in which he found that the landlords were entitled to participate in the distribution of the fund arising from the sale of the bankrupt's assets ahead of the claim of the City of Richmond and of the Commonwealth of Virginia for franchise tax and registration fee, but recited an agreement by which final determination of the question should await the decision of the Supreme Court of Appeals of Virginia as to whether, under like circumstances in a case before it, the City and State did in fact have a lien for their taxes without making a levy.

Under date of March 12, 1913, the referee made another report, in which he stated that the case in the Virginia appellate court had gone off on a question of jurisdiction, and in which he proceeded to hold that, under the proper construction of Section 67 (*f*) of the Bankruptcy Act, the landlords were not entitled to a lien, and that being, therefore, relegated to the class of general creditors, the City and State were preferred in the distribution of assets by virtue of Section 64 of the Bankruptcy Act. To this report the landlords filed exceptions, which were treated by the court below as a petition to review such report, and the court, by an order entered on the 14th day of April, 1914, reversed the ruling of the referee and held that the landlords did have a valid lien for their rent under the Bankruptcy Act, and that such took priority over the claims of the State of Virginia and of the City of Richmond.

36

On April 21, 1916, the court below, having previously granted a rehearing on application of the City of Richmond, handed down an opinion reversing its former ruling, and holding that the City's claim for taxes should take priority over the landlords' lien, and carried this ruling into effect by the entry of an order on June 19, 1916, which order we are now asked to review.

We are not unmindful of the importance of the questions involved in this controversy. That the State and its municipalities should be clothed with ample power to assess and collect taxes promptly and with as little delay as possible is conceded. In this suit, as appears from the statement of facts, a controversy has arisen which involves on the one hand the character of a lien to which a landlord is entitled under the laws of the State of Virginia, and on the other the character of a lien for taxes to which the City of Richmond is entitled by virtue of its Charter.

The petitioners rest their "claims upon those statutes of Virginia which are merely declaratory of the common law principle of distress for rent in arrear which obtains in one form or another throughout the entire English-speaking world."

Section 2787 of the Code of Virginia is pertinent to this case, and reaffirms the common law, to-wit:

37 "Rent of every kind may be recovered by distress action."

Section 2790 also provides:

"Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not."

Section 2791 is in the following language:

"The distress may be levied on any goods of the lessee, or his assignee, or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days. If the goods of such lessee, assignee, or under tenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are on the leased premises, that shall be liable to distress, but not more than one year's rent, whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section."

In this instance it appears that the landlords proceeded to enforce their statutory rights and to perfect the inchoate lien, which they had by virtue of their lease, by levying a distress warrant for eighteen months' rent, which gave them a lien subject to the provisions of Section 2792, in which it is provided that "neither this or the preceding section shall effect any lien for taxes, levies, or militia fines."

The referee who passed upon this question in his second report held that this lien was of no effect because of Section 67 (*f*) of the Bankruptcy Act, that part which is germane being in the following language:

"All levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any

time within four months prior to the filing of a petition
38 against him shall be deemed null and void in case he is adjudged a bankrupt * * *."

The framers of the Bankruptcy Act in employing the words "levies," etc., obviously had reference to writs of execution, fi. fa. garnishment, etc. In other words, this section is limited to liens obtained through legal proceedings. This, we think, easily distinguishes the liens contemplated by Section 67 (*f*) from the landlords' lien, which is not, in any sense of the word, a lien obtained through legal proceedings. Collier on Bankruptcy, at page 966, in referring to levies under Section 67 (*f*), says:

"A lien acquired by a levy under a landlord's distress warrant is not obtained through legal proceedings within the meaning of this sub-section."

A landlord's lien is contra-distinguished from the other class of liens to which we have referred in that it is inchoate from the moment the lease is executed, and may be made perfect at any moment by distress, a remedy which is summary in its character.

The Bankruptcy Act is intended to prevent one general creditor from obtaining an advantage over another. In other words, it was the intention of the Congress in the enactment of this law that where one becomes unable, by misfortune or otherwise, to meet his obligations to preserve the status of his estate so that there may be an equal distribution of his assets between all his creditors subject to the claims of lien creditors whose standing is fixed by the statute. In other words, to prevent preferences and secure a fair and impartial distribution of the bankrupt's estate among his creditors, having, as we have stated, due regard to the valid liens of any of his secured creditors.

We do not think there is anything in the statute to authorize the contention that a landlord should be treated as a general
39 creditor and thus deprive him of the lien which is guaranteed by the statutes to which we have referred. Remington on Bankruptcy, Section 1160, in referring to this point, says:

"A landlord's lien for rent, or right of priority on distribution, is not impaired by the bankruptcy act. But the subject is complicated by the fact that landlords are frequently also given priority by state law, upon distribution of an insolvent estate, regardless of lien, and that this priority is preserved in bankruptcy by Section 64 (*b*)."

The referee in the report to which we have referred cites the case of Westside Paper Company, 20 A. B. R. 289, in support of his contention. In that case the District Court held that a levy of a distress warrant for rent made within four months was invalid. However, this case was carried to the Circuit Court of Appeals for the Third Circuit, where the judgment of the lower court was reversed. 162 Fed. 110. That court in referring to this phase of the question said:

"Distress for rent in arrear is one of the most ancient as well as 'one of the most efficient of the landlord's remedies for the collection of rent.' It is in most of our States, as it was at comman

law, a right sui generis belonging to the landlord whenever the right of landlord and tenant existed. It appears to have been abolished in a few of the States, and in most of them its exercise has been regulated by statute. Its essential characteristics are, however, for the most part, the same as existed at common law. * * * The right to distrain or levy upon all the goods upon the demised premises, whether those of a tenant or a stranger, arises the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. * * * No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure; of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples.

"While there is no specific lien, except on the goods actually distrained under the landlord's warrant, all the goods on the demised premises are to be considered as being under a quasi pledge, which gives superiority to the specific lien established by the distraint. Such a lien is in no sense 'obtained through legal proceedings.' Nor is it within the spirit of the bankrupt law in this regard, as evidenced by other provisions thereof, as well as that of 67 (*f*) above quoted."

Also, the case of In re Burns, 175 Fed. 633, is very much in point.

This question was also passed upon in the case of In re Smith & Robinson, 154 Fed. 343. In that case a distress warrant was levied just two days before the petition in bankruptcy was filed. The learned judge who heard the case, after citing sub-Sections *c* and *f* of Section 67, then stated the claim of the appellants as follows:

"That the seizure in distress is, within these paragraphs, in the nature of a suit or proceeding in attachment, and having been begun within the four months before bankruptcy is annulled by the adjudication in bankruptcy.

"We cannot concur in this view. The whole question is one of interpretation of the Bankrupt Act—the policy of that act respecting the recognition of liens in the distribution of bankrupt estate. Paragraphs *c* and *f* quoted were meant, in our judgment, to relate only to those actions or proceedings taken by creditors, who having no existing lien or right of lien resting in existing contract, entered into in good faith, seek to obtain preference by being first in a race of diligence.

"But the lien obtained by the distress warrant under the kind of lease involved in this case is not the result of a race of diligence. Under the lease * * * the right of lien was created when the lease was executed and the tenant entered upon possession of the premises—a right put wholly, at that time, within the control of the landlord and maturing the moment the

landlord chose to mature it. And though it did not actually attach until within four months of the bankruptcy, it was the kind of lien, it seems to us, that section 67-*d* was intended to preserve; for unquestionably as between the parties to the lease it was a lien, not simply because the distress warrant was actually levied, but because, by contract between them, the levy of the distress warrant was authorized."

There are a number of other cases wherein the Court of Appeals in the other Circuits have taken the same view of this matter. In the case of In re Emslie, 42 C. C. A. 350, where a mechanics' lien was filed within four months preceding the adjudication in bankruptcy the Circuit Court of Appeals for the Second Circuit held that it was protected by Section 67 (*d*). The court in that case in referring to this point said:

"There are no equitable considerations in favor of the general creditors of a debtor which should defeat a mechanics' lien. Every creditor dealing with the debtor does so with the knowledge that those who are furnishing labor and materials for the building can, if they choose, acquire a priority of payment over other creditors. Statutes giving such liens are designed to enable mechanics and material men to rely upon the security of the building itself, without looking to the responsibility of the owner. The justice and expediency of giving such claims priority over the debts of general creditors is manifested in the legislation of the several States. We cannot believe that it was the intention of Congress to put them upon the footing of the liens particularly mentioned in Section 67. The question of the validity of such liens was considered by the Circuit Court of Appeals for the Seventh Circuit. In re Kerby-Dennis Co., 36 C. C. A. 677, 95 Fed. 116. In considering the provisions of Section 67 the court used this language:

" 'We cannot indulge the presumption that Congress intended to avoid a lien secured by the act of labor, and preserved and
42 continued in force only when legal proceedings are instituted within a specified time. Such a construction would avoid all mechanic's liens, and all the liens of laborers, which the laws of various States have for years sought to protect and to prefer.'

"We agree with the opinion of that court that the terms of Section 67 do not invalidate such a lien."

In re Yoke Vitrified Brick Co., 180 Fed. 235.

In the case of In re West Norfolk, 112 Fed. 767, Waddill, District Judge, in referring to the statute which provides for a supply lien, said:

"The time of furnishing the supplies is the period as to which the material man is given a right of lien. The right to claim the lien arises under this section, and may be enforced at any time after the supplies are furnished; but may be lost by failure to comply with some provision of the act giving the right. The only requirement is that the lien shall be filed within ninety days after the last item of the bill becomes due and payable. If the claim is

filed within that time, the lien secured relates to the time the supplies were furnished."

Likewise, under the Virginia statute the lien dates from the time the tenant takes the lease and places his goods upon the premises; such right is inchoate and continues as such until a distress warrant is executed on the property. In other words, the landlord's right is in the nature of a lien, and to enforce which he has only to comply with the provisions of the statute that authorizes distraint, and when the distraint is executed it relates, as it was said in the case just quoted, to the date when the tenancy began.

It is insisted that Section 64 (*a*) of the Bankruptcy Act gives the claim of the City priority over that of the landlords. The Section in question is in the following language:

43 "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

It should be borne in mind that the landlords do not invoke this section, but place their claim upon the ground that they are lien creditors. Section 67 (*d*) reads as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall to the extent of such present consideration only, not be affected by this act."

There is nothing contained in the foregoing that could be construed so as to affect the lien of the landlords. Section 64 (*a*) has no reference to lien creditors, but is intended to apply only to general creditors, and should be read in connection with sub-Section *b* relating to debts that are to be paid in full, to-wit: costs of preserving the estate; filing fees in involuntary cases; costs of administration; wages; debts entitled to priority by the laws of any State or the United States.

Counsel for respondent, among other things, say:

"It will be observed that the language of Section 64 (*a*) is that the taxes are to be paid prior to 'dividends to creditors.' There can be no controversy over their priority to unsecured creditors but it is claimed by petitioners that, having secured a lien by a distress levy prior to the petition and adjudication, they are entitled to be paid in full in preference to the taxes, upon the theory that they

44 do not get a dividend and that dividends are only paid to unsecured creditors. That this is erroneous has been held in the cases of re Muhlhauser, 9 A. B, 81, and re Barber, 97 Fed. 547. In the last named case the meaning of the word 'dividend' is discussed at length * * *."

While it is true the cases of In re Muhlhauser and In re Barber, supra, sustain the contention of respondent, nevertheless the great

weight of authority is to the contrary. The term as employed in the Bankruptcy Act is well defined in the case of Hawthorne vs. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342. This definition is also to be found in Words and Phrases, Vol. 2, page 102 (Second Series), as follows:

"Under Bankr. Act July 1, 1898, c. 541, Section 65-*a*, 30 Stat. 563, providing that dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured, the word 'dividends' as used in the bankruptcy act applies only to claims of general unsecured creditors and not to secured creditors, except as to the amount of the claim in excess of the security."

In the case of In re Utt, Vol. 5, A. B. R., 383, the Circuit Court of Appeals for the Seventh Circuit, in passing upon this point, said:

"The point in dispute is: What is the meaning of 'dividends,' as the word is used in these provisions? The question has been considered in a number of cases by the District Courts. In re Ft. Wayne Electric Corp. (D. C.), 3 Am. B. R. 186, 94 Fed. 109; In re Fielding (D. C.), 3 Am. B. R. 135, 96 Fed. 800; In re Barber (D. C.), 3 Am. B. R. 306, 97 Fed. 547; In re Sabine, 1 Am. B. R. 321. We agree with the conclusion declared in the first two of these cases that the sums to be paid upon secured claims or other claims entitled to priority of payment are not 'dividends' upon which the trustee or referee may receive a commission. This is made clear by other provisions of the statute. By Sections 56*b* and 57*e* creditors holding claims which are secured or have priority can vote at creditors' meetings, or their claims be counted in computing either the number of creditors or the amount of their claims, only when the claims exceed the value of the securities or priorities, and then only for the excess. They are treated as creditors only for the unsecured excess. Section 65*a* declares that 'dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.' This, if not strictly speaking a definition of the word 'dividend,' is equivalent to a declaration that in this respect claims having priority and secured claims are upon the same footing. The opinion in the Barber Case, supra, recognizes this construction, but makes a distinction against secured creditors who invoke the action of the bankruptcy court, and through the action of that court alone have their security converted into a fund in the hands of the trustee. 'If a secured creditor,' it is said, 'refrains from asking or invoking the aid of the court of bankruptcy to enable him, through its officers, and its exercise of jurisdiction, to turn his securities into cash, then, although the court, for the benefit of the unsecured creditors, should use its equitable power to the extent of selling the incumbered property free and discharged of the incumbrance, assuming to care for the equitable rights of the secured creditor in its disposition of the moneys arising from the sale, there would seem to be reason for holding that the moneys going to the secured creditor under such circumstances only came into the case incidentally as the result of the effort to realize and obtain other money for the unsecured

creditors, and that it should not be regarded as any dividend, or charged with any commissions. * * *.' We find no warrant for this distinction in the terms of the statute."

Also, Collier on Bankruptcy (10th Edition), page 16, in referring to In re Barber, supra, among other things, says:

"It may be doubted whether this is correct since under Section 65 (*a*) dividends can only be paid on claims which are neither secured or entitled to priority."

46 It is obvious that the word "dividend" as employed in Section 64 (*a*) of the Bankruptcy Act was intended to apply to all claims except such as are secured or have priority.

In the case of New Jersey vs. Lovell, 179 Fed. 321, it was contended that the taxes due the State should take priority over costs, including those in preserving the bankrupt's estate after filing the petition. The Circuit Court of Appeals for the Third Circuit, after quoting sub-Sections *a* and *b*, said:

"Now while the relative order in which sub-divisions (*a*) and (*b*) are placed is not happy and indeed tends to mislead, yet the general intent of the section is clear. In sub-division (*b*) we find the general scheme of awarding priority in advance of dividend creditors. That sub-division makes provision for paying such costs, fees and liens as are therein provided, and if there are no outstanding taxes, the fund is then paid to creditors. But before paying creditors, sub-division (*a*) intervenes and makes provision for what, if omitted, has often proved a hardship, if not indeed, an abuse, in the settlement of decedent and insolvent estates, viz., delay in payment of taxes. Tax collectors whose powers to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as general creditors, were subjected to trying delays. Obviously sub-division (*a*) meant that this delay should not occur, and therefore provided that, 'in advance of payments of dividends to creditors,' the court shall order the trustee to pay 'all taxes legally due and owing by the bankrupt * * *,' and to prevent delay from questions concerning such taxes, it provided, in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court. And yet in case the court had to take testimony or order a reference to determine the legality of such tax, the adjudged tax would, under the construction here contended for, absorb the whole fund and leave unpaid the agency by which its payment was effected. Now whether the 'creditors' referred to in the phrase 'in advance of the payment of dividends to

47 creditors' places the payment of taxes ahead of dividend creditors alone, or places it also ahead of those creditors who, under sub-divisions (4) and (5) are paid in full, is a question not before us. It suffices to say that on the question that is before us, namely, whether the taxes of a State are under clause (*a*) given priority over the actual and necessary cost of preserving the estate subsequent to filing of the petition we are clear they are not."

The State of New Jersey in that case applied for a writ of certiorari to the Supreme Court of the United States, which was denied.

This court in the case of Mills vs. Virginia-Carolina Lumber Co., 164 Fed. 168, in passing upon this question said:

"Aside from the mere cost incident to the proof of the claim, we do not see how this creditor should be required to pay any part of the costs of the administration of this bankrupt's estate. The lumber company had its claim secured by deed in trust on the property of the bankrupt, and it was entitled to have its claim paid in full, provided the property so conveyed would bring enough. The trustee in bankruptcy elected to sell this property and has the proceeds of the sale in hand. The lumber company, in our opinion, is entitled to have of the proceeds of the sale sufficient to pay its debt and interest, provided there is enough. If the property did not bring enough to pay the debt and interest in full, then the lumber company is entitled to have the whole of the proceeds. In other words, this creditor, which has simply come into a bankrupt court and established a debt that is a lien upon specific property of the bankrupt, should not be charged, so as to reduce the security, by making the fund arising from such specific property liable for the costs of the general administration of the bankrupt's estate."

We do not deem it necessary to extend this discussion further than to say that there are numerous cases in support of the rule which we have announced, notably among them being In re
48 Williams Estate, 84 C. C. A. 434; In re Howard, 207 Fed. 402; In re Zahner, 193 Fed. 769; In re Halsey, 175 Fed. 825.

We will next consider the question as to whether under the laws of Virginia, including the Charter of the City of Richmond, the respondent is entitled to priority over the claim of the landlords in the absence of a levy pursuant to the authority granted by the Charter of the City. Section 73 of the Charter of the City of Richmond is in the following language:

"All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed, or trust, or mortgage upon goods or chatatels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

The Court below in referring to this section said that

"There is no limitation apparently upon the City's right of distraint for its past and present taxes."

This section is undoubtedly broad in its scope, and a casual reading of the same is calculated to give one the impression that a lien for taxes is given priority over all liens of whatsoever character. However, a careful analysis of the same leads us to the conclusion that the words, "for taxes due thereon," is in the nature of a limitation confining the lien thus given to the personal property on which the assessment is made for the current year. If this be the correct interpretation, then the State would only have a right to levy on

such property as it could show was owned and in the possession of the tenant at the time the levy was made.

49 Under the Charter of the City of Richmond complete and summary power is granted by which any taxes then due may be collected. In this instance it appears that notwithstanding the fact that the tax collector, who had ample authority to collect the taxes assessed and due for each year; took no steps to collect the same for a period of three years. Can it be possible that in a case where a third party acquires a lien upon the property on which assessment has been made he is to be deprived of the right thus acquired for years other than the current year upon which the assessment is made? It seems to us that a fair interpretation of this would be that the City has a right, independent of deeds of trust, mortgages or otherwise, to distrain and collect taxes upon such property for the year for which such assessment is made and where such property can be identified. It would be manifestly unfair in a case like the one at bar to permit the City, after it has neglected to collect the taxes by distraint and sale of the property for the years in which the levy is made, to thereafter displace the landlord's lien in favor of the City. We think that in order for the City to reach this property by levy it would have been necessary for it to have shown that the goods and chattels in the possession of the trustee were the same goods and chattels which the bankrupt had and on which taxes were assessed for the previous years. From the very nature of things, a stock of material and carriages, like a stock of goods is constantly changing, being diminished and replenished daily by sales and purchases, and there is no evidence to show that the landlords had in their possession in 1910 any of the material or carriages upon which the assessment was made for 1907, 1908 and 1909. The City having failed to establish this fact in the absence of such proof it thereby lost the right to levy upon the goods of the bankrupt for any year anterior to 1910.

The case of Taylor vs. Sutherlin-Meade Co., 107 Va. 787, is cited by counsel for petitioners in support of the caontention that

50 it is the duty of the court before distributing the funds under its control to provide for the payment of taxes and levies due by the bankrupt. It should be borne in mind that the question of delinquent taxes was not involved in that case. There the court expressly said that the appointment of a receiver had prevented a levy. From this expression we must infer that a receiver had been appointed before the taxes became due and before the City had the right to levy upon the property in question. Therefore, there is quite a distinction between that case and the case at bar. There the court speaks of the City being denied an opportunity to collect its taxes by levy. In this instance the City had an opportunity to collect the taxes but utterly failed to avail itself of the summary remedy afforded by the provisions of the law which authorized the assessment and collection of taxes.

The Supreme Court of Virginia passed upon this question in the case of Jackson Coal Co. vs. Phillips Line (Va.), 75 S. E. 681. In that case the court of first instance gave the State and the City of

Petersburg priority for delinquent taxes over lien as well as general creditors of the insolvent steamship line, which was in the hands of receivers. The court in passing upon this phase of the question said:

"With respect to that part of the decree appealed from, which directed the payment of taxes due from the Philips Line, and its predecessor in title, to the State of Virginia and the City of Petersburg, out of the fund under the control of the court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the Auditor of the State or by the City of Petersburg, to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the
51 Phillips Line ordered. The State had a right, under Sections 604-623 of the Code, for one year from the date on which the taxes in her favor were assessed to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the City of Petersburg had a right of distress against the property assessed with taxes in its favor, which the City might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised.

"Under these circumstances, neither the State nor the City had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and, therefore, the position of the State and City was no better than that of the general creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them (the State and City), respectively, for the year 1910, assessed against the receivers."

This decision, coming as it does from the highest court of the State, clearly indicates the rights of the City under the facts of this case, and, we think, is conclusive. Taylor vs. Secor, 92 U. S. 575; Lewis vs. Munson, 151 U. S. 554.

The Supreme Court of the United States in speaking of the weight to be given to the decisions of the highest court of a State bearing upon local questions of this character, in the case of Bailey vs. McGuire, 89 U. S. 215, employed the following language:

"The whole subject we have discussed recently came before the Supreme Court of Missouri in the case of The Pacific Railroad Company vs. Cass County. The assessor of Cass County had levied taxes for both State and county purposes on the property of the company in the county, and the question was whether these levies were authorized. The court held that the taxes for county purposes were rightfully assessed, under the general revenue laws, but that the taxes for State purposes were unauthorized, because Sec-

52 tion 12 of the Act of 1852 had been repealed either by an express provision of a subsequent law or by necessary implication, and being in force, State taxes could only be collected in the way pointed out in that section.

"As it is the peculiar province of the highest court of a State to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the State, this decision is controlling."

From what we have said it follows that the City and State had the right to levy and collect the taxes for the year 1910, its tax collector having used due diligence as to the collection of taxes for that year. However, as to the years 1907, 1908 and 1909 we are of opinion that the lien of the landlords is entitled to priority over that of the City, and that the court below was in error as respects this phase of the case.

We have carefully examined the cases relied upon by the City, but in the light of the authorities we have cited bearing upon the Bankruptcy Act, as well as the case of Jackson Coal Company vs. Phillips Line, supra, we are of opinion that the judgment of the lower court should be reversed and the case remanded with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

WOODS, *Circuit Judge*, dissenting:

The Ainslie Carriage Company was adjudicated a bankrupt on February 3, 1910. In the distribution of the funds derived from the sale of its property a contest arose between the City of Richmond, claiming arrears of taxes, and Elizabeth M. Bird, Loulie M. Nolting and Charles E. Whitlock, claiming rent due them as owners of the premises occupied for business purposes by the carriage company.

The question to be decided is whether the District Court was
53 right in holding that the taxes should be paid in preference to the rent.

The facts are: On November 1, 1909, the petitioners levied a distress warrant on the goods and chattels found on the premises leased from them by the carriage company for $2,929.57 arrears of rent. Before sale could be made the Chancery Court of the City of Richmond took charge of all the assets of the carriage company, and was administering them at the time of the adjudication in bankruptcy, when all the assets were turned over to the District Court for the Eastern District of Virginia. Upon the estate coming into the hands of the bankruptcy court the petitioners proved their debt for rent, and claimed the proceeds of sale by virtue of the lien acquired by levy of the distress warrant under Sections 2791 and 2792 of Virginia Code. At the time the distress warrant was issued, taxes on the property were due to the City of Richmond for the years 1907, 1908 and 1909, and after it passed into the hands of the Court of Chancery the taxes for 1910 became due, the whole amounting to $657. The landlords conceded that the taxes for the year 1910 should be paid in preference to their claim, but asserted

their lien to be superior to that of the City for the delinquent taxes of 1907, 1908 and 1909. There is no claim on the part of the City that the landlords' lien was invalid under Section 67 (*f*) of the Bankruptcy Act because perfected by distress within four months of bankruptcy. In re Emslie, 102 Fed. 291, 42 C. C. A. 350; In re Smith, 154 Fed. 343; In re Westside Paper Co., 162 Fed. 110.

We consider first the effect of the Virginia statutes. Section 2792 relating to distress for rent puts this limitation upon the effect of the levy of the warrant: "Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines." It will be observed that the statute does not expressly create a lien in favor of the landlord by virtue of the distress for rent, but does so only by necessary implication. By an implication still stronger the
54 following section of the Charter of the City of Richmond confers a lien of taxes on personal property:

"Sec. 73. All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes thereon, no matter in whose possession they may be found."

The right to distrain and sell goods and chattels for taxes "wheresover found" means that they may be taken if found in the hands of one holding under the landlords' right or any other claim whatever. It seems to me that this is the meaning of the law beyond all doubt, but if there were any doubt it should be resolved in favor of the collection of the public revenue. Indeed, this construction seems to be conceded, for it is admitted that the rent claim must yield to the taxes for the year 1910; and it was the construction adopted by the Supreme Court of Virginia in Jackson vs. Phillip's Line, 114 Va. 40, as to the taxes for the current year due the City of Petersburg.

In the case cited it was decided, however, that the right of the State to levy for taxes expired at the end of one year from the date at which the taxes were assessed; and "that the City of Petersburg had a right of distress against the property assessed with taxes in its favor, which the City might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby have secured a lien therefor, but these rights were never ex-
55 ercised." The Charter of the City of Richmond contains no such limitations as to taxes after they are returned delinquent; but on the contrary provides by Section 51 that the officer charged with the collection of delinquent taxes "shall have the same power to collect by the same means and processes all bills, assessments and accounts delivered to him as are conferred by the City Charter upon the Collector of Taxes." The case before us is thus clearly distinguished from Jackson vs. Phillip's Line, and falls within the general principles so well stated in Taylor vs. Sutherlin,

etc., Co., 107 Va. 797. Hence, it follows that there was the same right of distress for the collection of taxes due the City of Richmond, and delinquent for the years 1907, 1908 and 1909 as for the current taxes of 1910.

If this reasoning be sound, the petitioners' claim to have a lien under the Virginia statute superior to the claim of the City of Richmond for taxes must rest upon this proposition: After the levy of the distress warrant for rent on behalf of the petitioners, the City might nevertheless have levied under a distress warrant for taxes and thus displaced to the extent of the taxes the lien of the landlords; but since the court took the property after the lien of the landlord had attached to it by distress, and thus made impossible a levy on behalf of the city, the right of the City to acquire the superior lien or preference was forever lost. It would indeed be a curious result for a court to seize property in the interest of general creditors, and thus forbid the City to exercise its statutory right of perfecting its inchoate lien by levy and then penalize it for not exercising the right. In such circumstances the court necessarily deals with the City as if it had actually done that which the court incidentally in the interest of others had prevented it from doing. The matter is thus disposed of by the Supreme Court, quoting with approval Greeley vs. Providence Savings Bank, 98 Mo. 458:

56 "It may be conceded that the State did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets—a right which it could have enforced through its revenue officers by the summary process of distress—but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets in custodia legis except in subordination to that right." In re Tyler, 149 U. S. 164; Taylor vs. Sutherlin, etc., Co., 107 Va. 797.

The statutes of Virginia 1897-98, page 824, V. C. Section 492 (*b*), forbid any court to distribute or dispose of funds or other property without first paying the taxes thereon.

The argument is presented that Section 73 of the Charter of the City of Richmond authorizes a levy on property only for taxes due thereon—that is, on the identical property assessed, and that the property in the hands of the court is not the property upon which the taxes were assessed. The argument falls for several reasons. First, the petition before us and the entire record refer throughout to the property levied on for rent as identical with that upon which the taxes were in arrears for 1907, 1908 and 1909; and the court should not assume that it is a shifting stock of goods. Second, even if it be assumed without proof that the property was a stock of merchandise changing in its items in the course of trade, surely it should not be assumed further that all of the goods in stock when

the taxes were assessed had been sold in the course of trade. The entire property realized in the hands of the court $3,343.02. The aggregate of the City taxes was $657. I do not perceive upon what ground it can be assumed that the entire stock had been pur-
57 chased since the taxes were assessed in 1907, 1908 and 1909, or that of the total stock, $3,343.02, found on hand there was not $657 worth on hand at the date of the assessment. Third, but even if it be assumed that the property was a shifting stock of goods and that all of its items had changed in the course of business, the argument is still unsound. Of necessity the law considers a merchant's stock a definite entity upon which the taxes are assessed and remaining the same aggregate entity until the taxes are paid, notwithstanding the changing of the items in the regular and anticipated course of trade. Surely it cannot be the law that if a dealer's stock of dry goods or groceries are assessed for taxes in January and in the course of business the dealer sells all of the particular goods then on hand, replacing them with others, the City would be unable to enforce its right by levy on the stock because the items of stock had been changed.

There is no force in the suggestion that the City lost any right conferred either by the Federal or State statute by the mere procrastination of its officers. Robertson vs. Sichel, 127 U. S. 507; Howard vs. Richmond, 94 Va. 79. It is no hardship that a preference is given for taxes for all may ascertain if they have been paid by inquiry at the proper office.

It thus seems clear that if the Bankruptcy Act were silent on the subject, the statutes and decisions of Virginia require all taxes due the City to be paid in preference to the distress for rent.

Let it be assumed, however contrary to this conclusion, that the view most favorable to the petitioners is correct, namely, that the landlords acquired by their distress for rent a first lien on the property under the statute law of Virginia, which could not have been displaced by the levy of a distress warrant for the delinquent city taxes. Nevertheless, under the bankruptcy statute the court is required in accordance with the general equity rule to pay the taxes before distribution of the proceeds of the sale to the
58 petitioners or any other lien creditors. The following sections seem to make this very clear:

"#64 (*a*). The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipt of the public officers for such payment shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

"#57 (L). Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part.

"#65 (*a*). Dividends of an equal percentum shall be declared

and paid on all allowed claims, except such as have priority or are secured."

The requirement put upon the court itself by Section 64 (*a*) to pay taxes in advance of the payment of dividends is not limited in its application to dividends to unsecured creditors. Taxes are not debts, and the statute means that they are to be paid in preference to all debts.

The statute by Section 57 undertakes to provide for the proof of secured as well as unsecured claims, and for the rights of all classes of creditors; and in sub-division (L) of that section the word "dividend" must be referred to the distribution of the assets to all classes before referred to in the section, that is, secured or unsecured, and the recovery of dividends improperly paid to any creditor of any class mentioned, secured or unsecured.

Section 65 (*a*) clearly means that dividends of equal per cent. shall be paid on all allowed claims, and that dividends on secured claims shall be paid in view of their priority.

59 & 60 It could hardly be denied that the pro-rata distribution of the proceeds of the sale of the property of a bankrupt corporation to the holders of its mortgage bonds would be the payment of dividends to them. To restrict the meaning of "dividend" to payments made to unsecured creditors would not only distort the act, but would mean that the act had made no provision whatever for distribution of assets in the hands of the court belonging to secured creditors of the same class or different classes. The word "dividend" is not one of the words limited in its meaning by a definition contained in the act itself, and hence it has its usual well-known meaning, per centum of payments made in the distribution of funds in the hands of the court to all creditors whose claims are before it. It is true it is more frequently used in the act in connection with the distribution to unsecured creditors; but that is not controlling, for the same word or phrase often has a different meaning in the same statute according to its association. American S. Co. vs. Commissioners, 224 U. S. 491. The universally recognized rule of practice is that the courts, even when there is no statute on the subject, pay the taxes on property from the proceeds of its sale before paying dividends on debts of lien creditors, and that too without respect to whether taxes have been made a lien by statute or not. In Section 64 (*a*) of the Bankruptcy Act Congress has by statute enjoined on the courts the observance of this rule.

In support of this conclusion it seems only necessary to refer to In re Tyler, 149 U. S. 184; New Jersey vs. Anderson, 203 U. S. 483; 2 Remington on Bankruptcy (2nd Ed.), Sections 2141-2144, and cases cited.

I think the judgment of the District Court should be affirmed.

61 *Judgment.*

Filed and Entered March 15, 1917.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia. In Bankruptcy.

This cause came on to be heard upon the petition and upon the answer of respondent, and on the transcript of record of the proceedings of the District Court of the Matter brought up for review, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in the matter brought up for review, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Richmond, for further proceedings in accordance with the opinion of this Court.

J. C. PRITCHARD,
U. S. Circuit Judge.

March 15, 1917.

On another day, to-wit, April 16, 1917, certified copy of the judgment of this Court is transmitted to the Clerk of the District Court at Richmond, Va.

62 *Stipulation of Counsel as to City Ordinances.*

Filed May 9, 1917.

Richmond, Virginia,

9th May, 1917.

Hon. James E. Cannon, Attorney at Law, Mutual Building, Richmond, Virginia.

DEAR SIR: Please take notice that I have applied to the United States Circuit Court of Appeals for the Fourth Circuit for a certified copy of the record in the case of Elizabeth W. Bird, Loulie W. Nolt-

ing and Charles E. Whitlock vs. City of Richmond. In the argument of this case before the Circuit Court of Appeals the ordinances of the City, relied upon and cited in the brief, were used as though in the record by stipulation of counsel, in conformity with my letter to you of September 27th, 1916, although I do not find any formal consent of record on your part. I therefore, request that you will—in acknowledging this notice—give your formal consent that all ordinances of the City cited in the brief shall be considered as in the record by stipulation of counsel.

Yours very truly,

GEO. WAYNE ANDERSON,
Assistant City Attorney.

I acknowledge the foregoing notice on this the 9th day of May, 1917, and I agree that the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit shall insert in the record a stipulation that all ordinances of the City of Richmond cited in the brief of the City shall be considered a part of the record on the petition for a Writ of Certiorari.

JAMES E. CANNON,
Attorney for Elizabeth W. Bird, Loulie W. Nolting, and Chas. E. Whitlock.

63 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 10th day of May, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit,
By CLAUDE M. DEAN,
Deputy Clerk.

64 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fourth Circuit.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United

States in the cause therein entitled on the 14th day of June, 1917, by annexing hereto a certified copy of the stipulation of Counsel of record, that the certified transcript of the record herein, now on file in the office of the Clerk of the Supreme Court, may be taken as the return of the Clerk of the Circuit Court of Appeals for the Fourth Circuit to the writ of certiorari issued herein.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 27th day of June, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit,
By CLAUDE M. DEAN, *Deputy Clerk.*

65 UNITED STATES OF AMERICA, *ss:*

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

Stipulation as to Return.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified transcript of the record herein, now on file in the office of the Clerk of the Supreme Court of the United States, may be taken as the return of the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to the writ of certiorari issued herein.

June 15, 1917.

JAMES E. CANNON,
Counsel for Petitioners.
GEORGE WAYNE ANDERSON,
Counsel for Respondent.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of Counsel is a true copy of the original filed June 27, 1917, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 27th day of June, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit,
By CLAUDE M. DEAN, *Deputy Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock are petitioners, and City of Richmond is respondent, No. 1461, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to superintend and revise, in matter of law, proceedings of the District Court of the United States for the Eastern District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command
67 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of June, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

68 [Endorsed:] 510-17. File No. 25,969. Supreme Court of the United States, October Term, 1916. No. 1139. The City of Richmond vs. Elizabeth W. Bird et al. Writ of Certiorari.

69 [Endorsed:] File No. 25,969. Supreme Court U. S., October Term, 1917. Term No. 510. The City of Richmond vs. Elizabeth W. Bird et al. Writ of certiorari and return. Filed June 28, 1917.